Office - Supreme Court, U.S.
FILED
OCT 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1765

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner

v.

HYDROLEVEL CORPORATION,
Respondent

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF OF ECOS ELECTRONICS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT HYDROLEVEL CORPORATION

MERLE L. ROYCE
CHAPMAN & ROYCE, LTD.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

Of Counsel:

JAMES P. CHAPMAN
CHAPMAN & ROYCE, LTD.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

In the

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
Petitioner

v.

HYDROLEVEL CORPORATION,

Respondent

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

---

MOTION OF ECOS ELECTRONICS CORPORATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT HYDROLEVEL CORPORATION, INSTANTER

Now comes ECOS Electronics Corporation and asks this Court for leave to file a brief *amicus curiae* in support of respondent Hydrolevel Corporation, instanter. In support of this motion ECOS Electronics Corporation states as follows:

(1) ECOS Electronics Corporation has a substantial interest in the issues presented in the instant case, as is set out in full in the attached brief.

(2) Hydrolevel Corporation has consented to the filing of numerous briefs as *amicus curiae* in support of Petitioner. Petitioner has refused to consent to the filing of this or any other brief as *amicus curiae* in support of Respondent.

WHEREFORE, ECOS Electronics Corporation asks this Court for leave to file a brief *amicus curiae* in support of respondent Hydrolevel Corporation, instanter.

Respectfully submitted,

MERLE L. ROYCE
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

Of Counsel:
JAMES P. CHAPMAN
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

TABLE OF CONTENTS

	Page
INTEREST OF ECOS ELECTRONICS CORPORATION	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE NATURE OF STANDARDS	4
II. THE NATURE OF STANDARDS ORGANIZATIONS	4
CONCLUSION	7

In the

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
Petitioner

v.

HYDROLEVEL CORPORATION,
Respondent

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

---

BRIEF OF ECOS ELECTRONICS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT HYDROLEVEL CORPORATION

INTEREST OF ECOS ELECTRONICS CORPORATION

ECOS Electronics Corporation ("ECOS") is a small manufacturer of electrical safety and measuring equipment. Like Hydrolevel, respondent in the instant case, ECOS has been the victim of anti-competitive activities of standards organizations.

ECOS is the plaintiff in a currently pending lawsuit in which it has alleged *inter alia* that its products have been wrongfully excluded from the marketplace by an irrational and arbitrary standard promulgated by the National Fire Protection Association ("NFPA") (*ECOS Electronics Corporation v. Daniel Woodhead, et al.*, Case No. 81 C 3939, currently pending in the United States District Court for the Northern District of Illinois before Judge John F. Grady.)

The briefs filed in this Court by petitioner, American Society of Mechanical Engineers ("ASME") and the National Fire Protection Association ("NFPA"), as *amicus curiae*, rely heavily on what is essentially a naked plea for the sympathy of the Court. They continuously refer to themselves as "voluntary," "nonprofit," and "dedicated to the public interest." Their plea to this Court is that the rule of liability enunciated by the Court of Appeals in the instant case, if allowed to stand, will destroy the ability of standards organizations to function.

ECOS respectfully submits that standards organizations are not delicate entities which cannot withstand the full force of the anti-trust laws. Rather, they are typically large, well-funded organizations whose "volunteers" are in fact executives of private companies who, as part of their jobs, work through various standards organizations to develop standards which will enhance their employers' market position.

The rule of liability enunciated by the Second Circuit in the instant case will not result in the destruction of standards organizations; rather, ECOS submits, this rule is the only rule by which standards organizations can be effectively brought within the ambit of the anti-trust laws.

SUMMARY OF THE ARGUMENT

The Second Circuit Court of Appeals in the instant case held that ASME is liable for damages to Hydrolevel caused by the promulgation of a misleading interpretation of a standard by two of ASME's members, and by its failure to properly supervise the activities of members who ASME knew had significant conflicts of interest.

Petitioner, ASME, supported by various *amicus curiae,* has challenged this ruling as unprecedented, unworkable and destructive of standards organizations' ability to function. The present brief is limited to a discussion of the latter two points, as the legal support for the Second Circuit's ruling is fully and persuasively set forth in Hydrolevel's brief before this Court, as well as in the Second Circuit's opinion itself.

ECOS respectfully submits that standards organizations are financially supported by private business concerns; their so-

called "voluntary members" are in fact typically highly paid executives in private business whose salary and expenses are paid by their employers while they are doing their "volunteer" work for standards organizations; and that private business is willing to make these large expenditures of money and personnel not because of their commitment to the public good, but because they understand that standards are a powerful force in shaping the market for their products and can therefore be used either to increase their own market penetration or to exclude competitors from the market.

All of the activities of standards organizations are carried out by these "volunteers." Unlike a typical corporation where the activities of shareholders cannot be properly imputed to the corporation, the activities of the members of a standards organization are identical to the activities of the standards organization.

Thus, in practical terms, the only way that standards organizations can be held accountable for their anti-trust violations is if they are held liable for the wrongful acts of their members where the organizations either approved of the wrongful conduct or, as in the instant case, knew that strong conflicts of interest were present, yet did nothing to prevent abuse of the standards making process. Affirmation of the Second Circuit's holding in this case is thus necessary if standards organizations are to be held accountable under the anti-trust laws.

ARGUMENT

Petitioner ASME in its brief before this Court requests that the ruling of the Second Circuit Court of Appeals in the instant case be reversed. ASME's argument, as well as the arguments of various standards organizations who have filed briefs *amicus curiae* in support of ASME's position, relies heavily on the allegedly "voluntary" or "non-profit" character of standards organizations.

ECOS respectfully submits that this characterization of standards organizations has no basis in fact. NFPA, which has submitted an *amicus curiae* brief in which it continually pleads with the Court to reverse the Second Circuit's ruling or risk destroying standards organizations, is among the larger standards or-

ganizations in the country. Its structure and methods of operation are typical of such organizations. The following argument, using NFPA's operations as they have affected ECOS as illustrations, demonstrates the artificiality of ASME's argument and the necessity for the rule of liability set out in the Second Circuit's opinion in the instant case.

I.
THE NATURE OF STANDARDS

Standards in the United States are developed under the auspices of hundreds of private, wholly unregulated standards organizations including NFPA and ASME. These standards specify in detail design and performance requirements for a virtually unlimited variety of consumer and industrial products.

Standards organizations themselves have no power to enforce compliance with the standards they promulgate. However, standards are routinely incorporated into legislation at all levels of government ranging from local building codes to Federal Occupational Safety and Health regulations. (Brief of ASME, page 3). Additionally, these privately developed standards are routinely incorporated into both government and private purchasing requirements. This use of their standards is actively encouraged by standards organizations.

Thus, if a particular product fails to comply with a specification included in one of these privately developed standards, it is barred from the market place as effectively as if its use had been legislatively prohibited. Likewise, if language in a standard appears to call for the use of a particular product, that product's market will expand as if its use had been legislatively mandated.

II.
THE NATURE OF STANDARDS ORGANIZATIONS

NFPA, among the largest of these standards organizations, has over 32,000 members. Its income for 1980 totaled over $15 million, and its expenses were slightly under $13 million.

NFPA has promulgated over 200 standards, including NFPA Standard 70-B: Electrical Equipment Maintenance ("NFPA

70-B"): the standard which has been used by ECOS' major competitor to substantially exclude ECOS from the market for its product.These standards are developed in committees by specially appointed technical committee members of NFPA. Members who are appointed to these technical committees comprise only a small portion of the total membership (less than 10 percent). Technical committee members typically are executives of large corporations which either market or use a product which is covered by the standard.

For example, there are two primary manufacturers of the particular equipment at issue in ECOS' anti-trust action: Daniel Woodhead Company, a large manufacturer of a wide variety of electrical devices, and ECOS, a smaller, more specialized manufacturer. The market for this equipment is vitally affected by the NFPA 70-B. In 1974, NFPA appointed Alan Reed, an executive officer of Daniel Woodhead Company, as chairman of the 70-B committee. Other members of the NFPA 70-B committee were employed by other large manufacturers of electrical equipment (e.g., Westinghouse Electric Corporation, Western Electric Company, and Pass and Seymour) or large users of electrical equipment (e.g., E.I. duPont de Nemours & Company, and Eastman Kodak Company). It is in the interest of these companies to resist technological advancement or change which could require them to modify or replace their existing equipment.

Each of these so-called "volunteer" technical committee members is paid by his employer for the time spent on his committee work. The employer also pays the expenses incurred by its employees while doing committee work.*

The potential conflict of interest which is inherent in this structure is obvious. Given the quasi-legislative nature of standards, the potential for stifling competition by manipulating standards is enormous. Yet, as the Second Circuit Court of Appeals so aptly pointed out in the instant case, ASME had virtu-

---

* Thus, one of the criteria for membership on NFPA's 70-B committee is a demonstrated financial backing which will enable one to attend committee meetings. This financial backing is routinely provided by the "volunteer's" employer.

ally no safeguards to insure that standards of their interpretations were not so manipulated.

In ECOS' case, Alan Reed was able to include language in NFPA 70-B which first, specifically excludes ECOS's product and second, virtually specifies the use of Daniel Woodhead Company's product. The full committee approved the standard, including this exclusionary language, and NFPA subsequently officially promulgated the standard as approved by the commitee.

In the anti-trust case brought by ECOS against NFPA and others, ECOS foresees that NFPA will adopt the same argument that ASME and NFPA, as *amicus curiae*, have taken before this Court. That is, whatever exclusionary activities may have been performed under its auspices, they were not officially sanctioned by NFPA and therefore NFPA should be held harmless for any damages which may have resulted from the wrongful conduct of individual members.

The metaphysical distinction between the actions of standards organizations and the actions of the members of standards organizations urged upon this Court by ASME and various *amicus curiae* has no basis in the practical everyday operations of standards organizations.

As ASME and NFPA readily concede in their briefs before this Court, the actual work of standards organizations—writing standards—is done entirely by their members (Brief of ASME, page 61, *Amicus Curiae* Brief of NFPA, page 3). In fact, standards organizations don't do anything other than through their individual members.

Recognizing this essential identity between standards organizations and their members, the Second Circuit held ASME liable for the wrongful acts of its members. ECOS respectfully urges that this Court must affirm the Second Circuit's holding if the enormous power wielded by standards organizations is to remain accountable under the anti-trust laws. Without this accountability, innovative companies like Hydrolevel Corporation and ECOS Electronics Corporation will continually be at the mercy of standards organizations which are dominated by their more established competitors. Free competition and technical

innovation will suffer, and the public will suffer from higher priced and lower quality products.

CONCLUSION

For all of the foregoing reasons, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

MERLE L. ROYCE
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789

Of Council
JAMES P. CHAPMAN
CHAPMAN & ROYCE, Ltd.
33 N. Dearborn Street
Chicago, IL 60602
(312) 263-0789